

JUN 16 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	No. 07-30438
)	
Plaintiff - Appellee,)	D.C. No. CR-07-00004-DWM-1
)	
v.)	MEMORANDUM*
)	
JESSEY LEE CHARLES)	
DECELLES,)	
)	
Defendant - Appellant.)	
_____)	
)	No. 07-30448
UNITED STATES OF AMERICA,)	
)	D.C. No. CR-07-00004-DWM-2
Plaintiff - Appellee,)	
)	
v.)	
)	
JAMES ERIC CASE,)	
)	
Defendant - Appellant.)	
_____)	

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, Chief District Judge, Presiding

Argued and Submitted June 4, 2008
Seattle, Washington

*This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

Before: FERNANDEZ and CALLAHAN, Circuit Judges, and WRIGHT,**
District Judge.

Jessey Lee Charles Decelles and James Eric Case pled guilty to the knowing possession of stolen firearms. See 18 U.S.C. § 922(j). At sentencing, the district court calculated their Guidelines ranges by applying an enhancement for possession of a firearm “in connection with another felony offense.” See USSG §2K2.1(b)(5) (Nov. 2005). They appeal and assert that the district court erred when it applied that enhancement. We agree and, therefore, vacate the sentences and remand.

(1) We agree with the district court’s decision to apply the November 1, 2005, version of the Guidelines. See USSG §2K2.1(b)(5) (Nov. 2005). However, we disagree with the district court’s consideration of the application note first adopted in the November 1, 2006, version of the Guidelines regarding firearms found and taken in a burglary¹ because it was substantive in nature. That is because it was not listed by the Commission as retroactive,² was not declared by

**The Honorable Otis D. Wright II, United States District Judge for the Central District of California, sitting by designation.

¹USSG §2K2.1, comment. (n.14(B)) (Nov. 2006) (“Application Note 14(B)”).

²See USSG §1B1.10(c) (Nov. 2006); USSG supp. to app. C, Amendment
(continued...)

the Commission to be clarifying,³ and, while it may have resolved a circuit conflict, its negative consequences to defendants suggested that it was substantive.⁴ Moreover, it changed the law of this circuit by imposing a per se rule regarding burglary that was contrary to our cases regarding the correct construction of §2K2.1(b)(5). See United States v. Valenzuela, 495 F.3d 1127, 1134 (9th Cir. 2007); United States v. Routon, 25 F.3d 815, 819 (9th Cir. 1994). Therefore, Application Note 14(B) could not be applied in this case.

(2) The determinative issue here is whether the firearms in question were possessed in connection with the burglary, that is did they “facilitate”⁵ the burglary or have “some potential to embolden the separate felonious conduct.”⁶ The evidence here does not support the district court’s determination that the firearms did embolden Decelles or Case. The court failed to consider the individual facts and circumstances surrounding this particular burglary. That is contrary to the

²(...continued)
691 (Nov. 2006).

³USSG supp. to app. C, Amendment 691 (Nov. 2006).

⁴See United States v. Rising Sun, No. 06-30614, slip op. 3867, 3880 (9th Cir. April 14, 2008); see also United States v. Sanders, 67 F.3d 855, 857 (9th Cir. 1995).

⁵Routon, 25 F.3d at 819.

⁶Valenzuela, 495 F.3d at 1133.

nuanced inquiry that we have required. See Valenzuela, 495 F.3d at 1134–35; see also United States v. Jimison, 493 F.3d 1148, 1149 n.4 (9th Cir. 2007). In other words, the mere raw fact that firearms were stolen by Decelles and Case in this burglary was not sufficient to support a finding that they were emboldened and a decision that they were, therefore, required to suffer the consequences of the enhancement.

Thus, we must vacate the sentences and will remand for resentencing on an open record. See United States v. Matthews, 278 F.3d 880, 885 (9th Cir. 2002) (en banc) (holding that in general “we will remand for resentencing on an open record – that is, without limitation on the evidence that the district court may consider”).

VACATED and REMANDED.